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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 58

W. WILLARD WIRTZ, SECRETARY OF LABOR, *Petitioner,*

v.

LOCAL UNION NO. 125, LABORERS' INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

Respondent, Local Union No. 125, Laborers' International Union of North America, AFL-CIO (hereinafter referred to as the "Local") accepts the references to "Opinions Below," "Jurisdiction," and "Statute Involved," set forth in the Brief for the Petitioner, the Secretary of Labor (hereinafter referred to as the "Secretary").

QUESTIONS PRESENTED

Title IV of the Labor-Management Reporting and Disclosure Act of 1959, provides a remedy whereby a union member who has exhausted his internal union

remedies may challenge the validity of an election conducted by his union by filing a complaint with the Secretary. If the Secretary, upon investigation of such complaint, finds probable cause to believe that a violation of the Act has occurred which may have affected the outcome of the election, he is authorized to challenge the validity of such election by bringing an action in a district court. This case raises for consideration the following questions:

1) Whether the instant civil action brought to set aside a local union's 1963 general election of officers was rendered moot by the conduct of the local's next regularly-scheduled and unchallenged general election of officers in 1966.

2) Whether the instant civil action was rendered moot, in any event, by remedial amendments to the local's constitution adopted at the October 1966 convention of the local's parent body.*

3) Whether a civil action by the Secretary under Section 402 to remedy election violations may encompass (a) matters not included in a member's complaint to the Secretary; and (b) matters not included in a complaining member's protest to his union.

STATEMENT OF THE CASE

A. The Factual Background

Local Union 125, of Youngstown, Ohio, is an affiliate of the Laborers' International Union of North America, AFL-CIO (hereinafter referred to as the "International"). In June 1963, the Local had more than 700 members (R. 47). About 950 local unions having approximately 500,000 members in the United States and Canada are affiliated with the International (R.

* This additional suggestion of mootness is being raised for the first time in this Court.

86). All of these affiliated local unions are governed by the Constitution of the International and by a Uniform Local Union Constitution (R. 50). The latter establishes standards and procedures for the triennial nomination and election of local union officers (R. 32-35), and also provides separate appeal procedures for raising pre-election and post-election complaints. Under these procedures any member aggrieved with the conduct of the nomination process is entitled to appeal directly to the International's General Executive Board prior to the election and any member aggrieved with the conduct of the election may protest directly to the International's General Executive Board within thirty days after the election (R. 38).

In accordance with Article VI, Section 1(a) of the Uniform Local Union Constitution (R. 35), at the Local's May 1, 1963 nomination meeting, three rank-and-file members were elected by a secret ballot vote of the membership to be Judges of Election (R. 60). Thereafter, nominations were conducted for all offices (R. 60). Cecil Dial, the incumbent Business Representative,[1] Andrew E. Jackson, a rank-and-file member, and a third candidate were each nominated for the office of Business Representative. The Judges of Election determined that each of the foregoing candi-

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[1] Although the Transcript of Record does not so indicate, the financial reports (LM-2), which are required to be filed annually by the Local with the Secretary pursuant to Section 201 of the Act, 29 U.S.C. 431, and which upon such filing become public documents, show that Dial was the Local's elected Business Representative from 1960 until his defeat in the July 1963 election. "Schedule 8—Disbursements to Officers" of the Local's financial reports for the years 1961, 1962, and 1963, which indicates the identity of the Local's officers during those years, is included as Appendix A, at pp. 1a-2a, *infra*.

dates was eligible to hold office (R. 46, 47). The June 8, 1963 election resolved all but one of the contests for office. A tie resulted between Dial and Jackson in the election for Business Representative (R. 64, 92). To resolve the tie, the Judges of Election conducted a runoff on July 13, 1963 (R. 64-65, 92). In the runoff, Dial was defeated by a vote of 198 to 179, and Jackson was sworn in as Business Representative (R. 55, 92).

On July 30, 1963, in accordance with constitutional provisions relating to post-election appeals (R. 38), Dial protested the conduct of the runoff to the International's General Executive Board, claiming that nine ineligible members had voted (R. 44-45). Dial's protest was acknowledged as a timely appeal, and it was placed on the agenda of the General Executive Board along with other cases scheduled to be heard (R. 42, 43). Dial and the officers of the Local were advised of the time and place of hearing, and both sides were afforded the opportunity to present documentary evidence and/or appear in person to testify (R. 42, 43). In accordance with this notice, a Hearings Panel of the General Executive Board convened on October 24, 1963, in Chicago, Illinois, to hear Dial's appeal (R. 43). Both Dial and a representative of the Local appeared before the Hearings Panel to present evidence (R. 44-45).

The Hearings Panel considered the entire record developed at the hearing, *viz,* the documents and testimony, and on the basis thereof, made findings of fact and a recommendation to the International's General Executive Board (R. 44-45). Based on this record, the Panel recommended that Dial's appeal be denied

on the ground that in view of the nineteen vote margin between Dial and Jackson, Dial's allegation that nine ineligible members had voted could not have affected the outcome of the election (R. 44-45, 92). On December 2, 1963, th General Executive Board advised Dial that it had approved and adopted the findings and recommendation of the Hearings Panel (R. 44-45, 92). Dial thereafter filed a complaint with the Secretary, asking "the Department of Labor to investigate an election held at Local 125, July 13, 1963" (R. 59).

On January 27, 1964 a representative of the Secretary notified the International's General President that an investigation had been conducted, not only of the July 13, 1963 runoff election but of the Local's June 8, 1963 general election of officers as well. The Secretary's communication asserted probable cause to believe a violation of Title IV had occurred, bottomed on the legal conclusion that members not in good standing had been candidates and had voted in both elections. The Secretary's view was predicated upon his interpretation of the "good standing" provision contained in Article VIII, Section 5 of the Uniform Local Union Constitution holding that all members more than two months in arrears in dues are automatically suspended and deprived of all membership rights, including the right to vote and to be candidates. Under the Secretary's view good standing could only be acquired by the payment of a readmission fee in accordance with Article VIII, Sections 7 and 8 (R. 37).

The Secretary found that the Local had not applied this constitutional provision and had thereby permitted automatically suspended members to be candidates and

vote in the June 8, 1963 general election, as well as in the July 13, 1963 runoff election. The International's General President was further advised that a civil action would be brought against the Local within sixty days of Dial's complaint to the Secretary unless all violations were remedied by the conduct of general nominations for all offices and a new general election (R. 68-70).

By letter dated January 31, 1964, the International's General President notified the Department of Labor of the International's legal position that the Secretary was without statutory authority to challenge either the nomination process or the conduct of the June 8, 1963 general election. The expressed ground was that, contrary to the requirements of Article XII, Section 8, of the Uniform Local Union Constitution (R. 38), no member had protested the nominations or the June 8, 1963 general election (R. 71-72). The General President acknowledged that Dial had timely and properly protested the July 13, 1963 runoff to the General Executive Board, and that his subsequent complaint to the Secretary concerning that election was properly within the Secretary's authority under Title IV (R. 71). The General President further advised that with respect to the Secretary's vague allegation that a violation had occurred in the runoff, the record developed before the Hearings Panel of the General Executive Board indicated that the number of ineligible voters alleged by Dial to have voted in the runoff could not have affected the outcome of the election. The General President concluded by stating that the International was prepared to restore the case relating to the runoff election to its appeals docket for reconsideration if additional information was submitted showing

that ineligible members, sufficient in number to affect the outcome of the election, had voted (R. 73-74).

B. The Proceedings Below

1. The District Court

On February 7, 1964, the Secretary filed a civil action against the Local in the United States District Court for the Northern District of Ohio, Eastern Division, to declare invalid the June 8, 1963 general election and the July 13, 1963 runoff. The complaint alleged that nomination and election irregularities had affected the outcome of the elections of all officers and asked for judgment declaring the elections null and void and an order directing a new general election under the supervision of the Secretary (R. 4).

On March 4, 1964, the Local filed a motion to dismiss the allegations of the Secretary's complaint which sought to set aside the general election of June 8, 1963. The district court (Connell, C.J.), granted this motion (R. 15). The court found that the complaint failed to allege that a member had "complained internally" about the conduct of the June 8, 1963 election; and that the internal union challenge by Dial against the runoff election could not operate to bring the entire general election under the scrutiny of the Secretary and the jurisdiction of the district court (R. 6-7). The court concluded from the legislative history that Congress did not intend to abrogate the traditional requirements of the exhaustion doctrine "in favor of summary action by the federal government" (R. 9), and that pursuant to such doctrine as incorporated in Section 402, "a complaining member must first seek redress from his peers before inviting the government to champion his cause" (R. 10). The court concluded

that the International had not been obligated to pass upon the election of June 8, 1963, and that it was not "estopped from asserting the failure of a condition precedent to the Secretary's complaint against the election" (R. 14). Judgment was entered on July 14, 1964 (R. 15). On August 19, 1964, the Local filed its answer to that portion of the complaint not affected by the earlier order of the district court (R. 16, 17).

On June 1, 1965, the Secretary filed a motion for summary judgment, "except insofar as said relief concerns that part of defendant's election held June 8, 1963" (R. 57-58). On April 19, 1966, the district court (Battisti, J.), granted the Secretary's motion directed to setting aside the runoff election for Business Representative. It found that fifty-eight ineligible members had voted in the runoff, and that these votes may have affected the outcome of the election (R. 99-100, 107). It further found that Jackson, who had been elected in the runoff, had not been properly qualified to run since he had not paid his dues within the constitutional period and was automatically suspended under Article VIII, Section 5 of the Uniform Local Union Constitution (R. 37, 108).[2] However, the court did not rely upon the foregoing ground in setting aside the runoff since no internal union challenge to Jackson's eligibility had been made.

The court declared the July 13, 1963 runoff election to be null and void and ordered that the Local's next regularly scheduled election for Business Representative be held under the Secretary's supervision. Judgment was entered on April 18, 1966 (R. 110-111).

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[2] Jackson paid his May and June, 1963 dues on July 1, 1963, a Monday (R. 83).

2. The Supervised Election

On May 18, 1966, in conjunction with the Local's preparations for its triennial election, the Secretary's representatives, pursuant to the order of the district court, held a pre-election conference with the Local's officers (R. 110). Details associated with the conduct of the nomination and election process, such as the nomination of candidates, notices of nomination and election, the date of election, the number of printed ballots, and the manner of selection of the Judges of Election, were agreed upon by the Secretary's representatives and the Local.

Nominations were entertained thereafter for all offices, including Business Representative. Dial, Jackson, and a third candidate were nominated to run for Business Representative. The election for Business Representative was conducted on June 11, 1966, and was supervised by four representatives of the Department of Labor. The election of all other officers was held simultaneously. The official results showed that Jackson, then the incumbent, received 168 votes; Dial, 161 votes; and a third candidate, 33 votes. The court, upon certification by the Secretary, issued an order declaring that Andrew Jackson was the duly elected Business Representative of the Local (Certified Transcript).

3. The Court of Appeals

The Secretary filed notice of appeal on June 10, 1966, the day before the supervised election, from: (1) the order of July 14, 1964, dismissing the portion of the complaint challenging the general election; and (2) the order of April 18, 1966 granting the Secretary's motion for summary judgment. The Local moved to dis-

miss the Secretary's appeal in the court of appeals on the ground that there was no longer an actual controversy between the parties, it having been mooted by the intervening general election of June 11, 1966.

On December 15, 1966, the court of appeals rendered its decision, finding that the present officers of the Local held office pursuant to the 1966 general election and not the 1963 general election challenged by the Secretary. It agreed with the Local that:

> . . . This fact renders moot the question on appeal, since the statutory remedies for election irregularities can serve no purpose here in light of the subsequent election which has been held. (R. 112)

SUMMARY OF ARGUMENT

I.

In Section 401 of the Labor-Management Reporting and Disclosure Act of 1959 Congress established standards and procedures to govern the conduct of union elections. In addition to guaranteeing such fundamental safeguards as a secret ballot and the right of candidates to have observers at the polls, Congress also sought to ensure that labor organizations would abide by their own organic principles of union democracy. Hence, it provided that union elections must be conducted in accordance with a union's own constitution and bylaws.

Section 402 establishes a narrow remedial scheme intended to enable union members to facilitate compliance by their unions with the provisions of Section 401. Under this scheme a member who has challenged the validity of an election conducted by his union before the union's internal tribunals and who is dis-

satisfied with the outcome of his appeal is authorized to file a complaint with the Secretary. Upon receipt of a complaint the Secretary is required to "investigate such complaint and, if he finds probable cause to believe that a violation" of Title IV has occurred he is authorized to bring suit to set aside "the invalid election" and to obtain an order directing the conduct of a new election under his supervision. In such suits the district court has the power to declare void "the [challenged] election" and direct the conduct of a "new election under supervision of the Secretary . . . ."

The language of the statute itself thus makes it abundantly clear that the Secretary is limited to seeking to set aside the results of an "invalid election," through the unseating of unlawfully elected officers. However, if during the pendency of the Secretary's suit a union conducts its next regularly-scheduled election it is self-evident that the Secretary's action is rendered moot. Otherwise, an order directing the Secretary to conduct a supervised election would bring about the unauthorized ouster of officers elected in the supervening unchallenged election, prior to the expiration of their constitutional terms of office, without any showing that they have been elected improperly. Rather than allowing such an incongruous result, the statute confines the court to invalidating challenged elections and thereby unseating improperly elected officers. And once the terms of office of such improperly elected officers have expired, there remains nothing of the invalid election to void and the cause is rendered moot.

The experience of the Department of Labor in administering Title IV indicates that the Secretary has been extraordinarily successful in the limited number

of suits which he has instituted and that mootness has not seriously impeded the vindication of statutory rights. It is also clear that the problem of mootness does not arise from a misreading of the statute but rather from the ordinary delays which commonly beset modern judicial administration. Hence, as has been suggested by the lower courts, the solution to the occasional inconvenience resulting from the application of mootness principles to Title IV cases resides in the expedition of hearings and trial of such cases to the greatest extent possible. An order of this court so directing would aid in promoting the statutory objective of resolving election disputes promptly without in any way sanctioning the courts and the Secretary to exceed their limited congressional mandate.

Even if it were to be assumed that notwithstanding the conduct of supervening union elections, the courts remain empowered to direct supervised elections, the need for such an election in the instant case has been entirely dissipated and the case is, in any event, rendered moot by reason of curative amendments to the Uniform Local Union Constitution adopted at the October 1966 Convention of the International.

The Secretary's complaint alleged that in the Local's 1963 general election, fifty to sixty members were permitted to vote and sixteen members were permitted to be candidates even though under Article VIII, Section 5 of the Uniform Local Union Constitution such members should have been denied the right to vote and to be candidates. The Secretary argued that under Article VIII, Section 5, the foregoing members had at some time failed to pay their dues within the required constitutional period and therefore were automatically suspended from membership. According to the Secre-

tary such members could not restore themselves to good standing for the purpose of voting eligibility without the payment of a readmission fee under the provisions of Article VIII, Sections 7 and 8 of the Constitution In addition, to qualify as candidates, such members would be required to maintain such good standing for two years after readmission.

This interpretation of the Uniform Local Union Constitution did not comport with the International Union's historical custom and practice, would have disenfranchised thousands of members, exacted from them unnecessary levies and deprived them of other valuable benefits of union membership. Accordingly, in October, 1966, subsequent to the conduct of the supervised election for Business Representative in the Local, delegates to the International's Convention unanimously adopted amendments clarifying the Union's Constitution to reject expressly the Secretary's interpretation and make loss of "good standing" contingent upon express action of the International Union. These amendments are set forth in Appendix D at pp. 24a-26a, *infra*. Their adoption renders the instant case moot since in any future election in the Local, all of the members claimed to have been improperly permitted to vote and be candidates would be permitted to vote and run for office if they had not, *in fact*, been suspended by the International and were current in the payment of their dues on election day.

II.

The language of the statute equally makes clear that the Secretary may seek to remedy only those violations with respect to which he has received complaints from members and that, in addition, he may do so only to

the extent that such complaining members have sought redress within their union concerning their protest. Hence, Section 402 of the Act preconditions the filing of a complaint by a member with the Secretary upon the requirement that the member must have "exhausted the remedies available under the constitution and by-laws of such organization and of any parent body" and that upon the filing of a complaint with the Secretary, "the Secretary shall investigate such complaint . . . ." Accordingly, the Secretary is precluded by the statute from going beyond the scope of a member's complaint as well as outside of those matters raised by the complainant before his union.

In the instant case, the complainant, a defeated incumbent, limited his complaint to the Secretary to the Local's July 13, 1963 runoff election for Business Representative. He also limited his protest to the General Executive Board of the International to that contest. There was no warrant, therefore, for the Secretary to seek to set aside the Local's June 8, 1963 general election; and the district court correctly dismissed the Secretary's complaint insofar as it sought to nullify that election.

The foregoing conclusion is amply supported in the legislative history as well as in the decisions of courts which have considered the question. Moreover, this position also finds strength in the well-established policy of the courts to refuse to entertain *de novo,* issues on appeal from decisions of administrative agencies unless the agencies first have had an opportunity to consider and pass upon the questions. The application of this policy to union tribunals is consistent with the intention of Congress to preserve and

promote union self-government and thereby encourage unions to manage their own affairs in a manner which will preclude the necessity for governmental intervention. The position advanced by the Secretary, which would permit a member to invoke his union's internal judicial processes as a mere *procedural* prerequisite to the filing of a complaint with the Secretary, would destroy completely those processes of internal union self-government which the Act seeks to encourage. Moreover, union tribunals are as entitled as the courts to avoid deciding cases or controversies not brought before them.

Finally, the fact that Congress limited the Secretary under Section 402 to bringing suit over matters which have been raised by a complainant before a union's internal tribunal would not entirely remove the Secretary's authority to investigate and monitor union elections. Under Section 601, the Secretary is given extensive authority to investigate and to report his findings to interested persons, including union members. Such investigations may be made without an election complaint having been filed by a member, as well as in the complete absence of probable cause to believe a violation has occurred. Members alerted by the Secretary to election misconduct as a result of Section 601 disclosures may seek to invoke the union's own internal procedures, and, if unsuccessful, they may then complain to the Secretary. But as to violations uncovered concerning which there has been no internal exhaustion and as to which no complaint has been received from a member, the Secretary is precluded from seeking judicial relief under Title IV.

ARGUMENT

I. THE INSTANT CASE HAS BEEN RENDERED MOOT BY SUPERVENING EVENTS

A. The Conduct of the Local's Regularly Scheduled and Unchallenged Election in 1966 Has Mooted the Secretary's Action

In Title IV of the Labor-Management Reporting and Disclosure Act of 1959, Congress prescribed standards and procedures intended to assure fair and honest union elections. In addition to requiring such fundamental safeguards as a secret ballot and the right of candidates to have observers at the polls and at the counting of the ballots, Congress also enacted substantive time limitations upon the terms of union office in order to guarantee that union elections would be conducted within reasonably frequent intervals. For example, Section 401(b) provides that "[e]very local labor organization shall elect its officers not less often than once every three years by secret ballot among the members in good standing." Further, to insure that labor organizations would remain faithful to their own indigenous norms regarding union democracy, Section 401(e) requires that a union's election ". . . shall be conducted in accordance with the constitution and bylaws of such [labor] organization insofar as they are not inconsistent with the provisions of this title."

Section 402 creates a narrow remedial scheme intended to permit union members to facilitate compliance by their unions with the standards of Section 401. It authorizes the filing of a complaint with the Secretary by a member who has challenged the validity of some aspect of his union's election before the union's

internal tribunals and who maintains that he has not been provided with either proper or speedy redress of his grievance. Upon the filing of such complaint, Section 402(b) requires that:

> The Secretary shall investigate such complaint and if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall, within sixty days after the filing of such complaint, bring a civil action against the labor organization as an entity in the district court of the United States in which such labor organization maintains its principal office *to set aside the invalid election . . . and to direct the conduct of an election* . . . under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe. The court shall have power to take such action as it deems proper to preserve the assets of the labor organization. (Emphasis added).

The statutory language thus clearly resolves the threshold question of whether a suit brought by the Secretary under Section 402 is mooted by the unchallenged conduct of the defendant union's next regularly-scheduled election. Under Section 402(b) it is apparent that the Secretary's authority is limited to bringing suit "to set aside the invalid election." In addition, in entertaining the Secretary's action, Section 402(c) provides that:

> If, upon a preponderance of the evidence after a trial upon the merits, the court finds—
>
> * * * * *

> (2) *that the violation of section 401 may have affected the outcome of an election, the court shall declare the election . . . to be void and direct the conduct of a new election* under supervision of the Secretary and, so far as lawful and practicable, in conformity with the constitution and bylaws of the labor organization . . . . (Emphasis added).

The court is thus restricted to declaring void "an election" as to which a "violation of section 401 may have affected the outcome" and to directing the "conduct of a new election." Hence, if in accordance with the time limitations set forth in a union's constitution, or in Section 401 of the Act, the union conducts its next regularly-scheduled election while a suit under Section 402 is pending, the action is rendered moot. Since the terms of office arising from the invalid election have expired, and new officers elected in the unchallenged, supervening election have taken office, there remains nothing of the invalid election to be voided. An order directing a new election, notwithstanding the conduct of an intervening, unchallenged election, would compel the unauthorized and premature unseating of the officers lawfully elected in the supervening election. And the removal of such officers prior to the expiration of their constitutional terms of office would exceed the Secretary's mandate which is limited to seeking to void an "invalid union election," as well as the district court's authority which is confined to setting aside a challenged election in which a violation has occurred.

The foregoing conclusions are reinforced by the language of Section 402(d):

> An order directing an election, dismissing a complaint, or designating elected officers of a labor organization shall be appealable in the same man-

> ner as the final judgment in a civil action, but an order directing an election shall not be stayed pending appeal.

This provision indicates that Congress recognized that the frequency of union elections taken together with the recurrent delays in civil litigation presented the possibility of mootness impeding the success of Title IV litigation. Hence, by enacting Section 402(d) it made certain that at least where the Secretary succeeded in obtaining a district order directing an election, his victory would not be short-lived by delays resulting from the issuance of a stay pending appeal.

The Second Circuit Court of Appeals recognized the applicability of these principles in *Wirtz* v. *Local 410, etc., Operating Engineers,* 366 F. 2d 438, 442:

> It would serve no practical purpose with respect to these locals to declare their 1962 elections void because the terms of office thereby conferred have expired. And because Title IV does not permit the Secretary to seek either to enjoin future elections, or to declare a given candidacy requirement unlawful absent a valid complaint and an investigation of its application to a specific election . . . we conclude that we have no power to afford the Secretary relief and therefore that these cases are moot.

In addition, in *Wirtz* v. *Local 153, Glass Bottle Blowers Assn.,* 372 F. 2d 86, appealed from in No. 57, the Third Circuit declared with respect to the mootness issue:

> For whatever reasons Congress, in enacting the enforcement provisions contained in section 402, did no more than to provide an administrative and judicial procedure for determining the legality of a particular election of local union officers. The

> only suit authorized under section 402 is a suit by the Secretary to set aside that election of which an aggrieved unionist has complained. (*Id.* at 88).

It is thus apparent that in the instant case no practical purpose would be served by declaring the Local's 1963 election void since the terms of office of those then elected have expired. Where the relief sought is futile, impossible, or at best, academic, no court should be called upon to act. This controversy became moot when, in accordance with the time schedule in the Local's constitution, the Local conducted a general election which was never challenged. As this Court declared in *United States* v. *Alaska Steamship Company,* 253 U.S. 113, 116:

> . . . this court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.

Moreover, the principle of mootness has been recognized as being particularly applicable to cases involving elections. Hence, in *Mills* v. *Green,* 159 U.S. 651, a suit against a South Carolina county supervisor of elections to enjoin a denial of voting rights in a forthcoming election, this Court declared the action moot by reason of the conduct of the election. See *Jones* v. *Montague,* 194 U.S. 147; *Bynum* v. *Burns,* 379 F. 2d 229 (8th Cir.); *Fair* v. *Dekle,* 367 F. 2d 377 (5th Cir.); *Munoz* v. *Amador,* 340 F. 2d 590 (5th Cir.); *Colpo* v. *Highway Truck Drivers, Local 107,* 305 F. 2d 362 (3rd Cir.) *cert. denied,* 371 U.S. 890.

The analogy to the Voting Rights Act of 1965, advanced by the Secretary to support his authority under Title IV "to undo elections not themselves shown to

be illegal," if "necessary to assure the complete extirpation of proven wrongful conduct" (Pet. Br. p. 27), is wholly inapposite. In addition to authorizing the district court in suits brought by the Attorney General under that Act to issue injunctions and appoint federal registrars, the Voting Rights Act expressly authorizes the district court to retain jurisdiction in such suits "for such period as it may deem appropriate" to enforce the guarantees of the fifteenth amendment.[3] Had Congress sought in the LMRDA to give the district courts similar ongoing authority in the supervision of union elections, it could readily have enacted comparable provisions in Title IV.[4] Congress chose instead to limit the courts to remedying specific violations arising in particular elections. And, as the Secretary concedes, Congress deliberately rejected injunctions as a Title IV remedy (Pet. Br. p.35).

Nonetheless, in support of his position the Secretary advances the novel theory that a finding of a violation of Title IV

> . . . destroys the presumption of regularity that would otherwise attach to the union's conduct of

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[3] "[D]uring such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U.S.C. 1973a(c).

[4] Reliance by the Secretary upon cases arising under the National Labor Relations Act, as amended, 29 U.S.C. 141 et seq., is equally misplaced. Congress, under that statute, provided for cease and desist and affirmative orders which contemplate prospective compliance, and also expressly authorized both mandatory and discretionary injunctive relief.

> its own election; the intervention of an unsupervised election is not sufficient to restore it. Even if it cannot be shown in a post-election investigation that the intervening election was conducted in violation of the Act, there can be no assurance that the unlawfully elected incumbents forewent the opportunities for manipulation that an unsupervised election permits. A laboratory election remains necessary to assure that the control achieved by violating the Act in the first election is not perpetuated by subtle means in the second (Footnote omitted) (Pet. Br. p.25).

While the Secretary thus takes the position that "the taint of the original election infects the next and is curable only by the Secretary's 'laboratory' election" (Pet. Br. p.19), and that an intervening election does not deprive him of authority to conduct such an election, the legislative history indicates that Congress expressly rejected proposals which would have required that union elections be supervised by governmental agencies, in favor of retention by unions of control over their own electoral processes.[5]

Aside from conflicting with the overall statutory scheme as reflected in the language of Section 402 and the relevant legislative history, the Secretary's theory relies upon several assumptions which have no foundation in reality.

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[5] S. Rep. No. 1684, 85th Cong., 2nd Sess. 12-15 (1958), reprinted in U. S. Department of Labor, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Titles I-VI*, p. 702 (1964) ("Dept. Lab. Leg. Hist." hereinafter); see also S. 1137, 86th Cong., 1st Sess., Sec. 302(a)(7)(1959), reprinted in National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, pp. 260, 297 (1959) ("NLRB Leg. Hist." hereinafter).

The first such false premise is that a "continuing need for a laboratory election exists when it is not known whether the violation giving rise to the Secretary's suit persisted into the second election" (Pet. Br. p.21). Hence, for example, the Secretary indicates that representatives of the Department of Labor who supervised the 1966 election for Business Representative in Local Union 125 were "not in a position to determine whether ineligible members either ran for office or voted at the election for the other officers" (Pet. Br. p.21, fn.4), *which took place simultaneously* with the supervised election for Business Representative. The flaw in this argument is twofold. First, it flies in the face of the facts of the instant case.[6] In-

[6] The uncontradicted affidavit of Martin M. Mason, Secretary-Treasurer of the Local filed in the court of appeals in support of respondent's motion to dismiss the Secretary's appeal on the ground of mootness declared as follows:

> Joseph D. Caiola, Rocco DeMarco, Charles S. Mato and Richard A. Crino represented the Department of Labor in supervising the election for Business Representative and observed and assisted during the general election of officers at the request of the election judges. The representatives handled the eligibility lists and in several instances determined that members were not eligible to vote. These members did not vote in either election. The representatives also supervised the distribution of ballots with election judges, handing out ballots for both elections. Department representatives also assisted members who could not read, in the voting booth and in depositing ballots in the box.
>
> The ballots cast in the election for Business Representative were counted first and this count was completed at approximately 9:00 p.m. Thereafter, the representatives of the Department of Labor stayed and observed the counting and tally of ballots cast in the general election and the declaration of results. The representatives left after all ballots were counted and the election judges announced the winners. (Certified Transcript of Proceedings in the Court of Appeals).

deed, in light of the Secretary's presence and participation during the conduct of the union's regular triennial election in 1966, it would appear that there is no longer any practical necessity for a "laboratory election" conducted under the Secretary's auspices.

The second flaw in this argument lies in its indifference to the Secretary's broad investigatory and visitorial powers under Section 601 of the Act pursuant to which he may monitor union elections from beginning to end without regard to whether complaints have been filed by members concerning such elections, *Local 57, Operating Engineers* v. *Wirtz,* 346 F. 2d 552 (1st Cir.); *Wirtz* v. *Local 191, Teamsters,* 321 F. 2d 445 (2nd Cir.), or whether there is cause to believe a violation has occurred. *International Bhd. of Teamsters* v. *Goldberg,* 303 F. 2d 402 (D.C. Cir.), *cert. denied,* 370 U.S. 938; *Goldberg* v. *Truck Drivers Local 299,* 293 F. 2d 807 (6th Cir.) *cert. denied,* 368 U.S. 938.[7] In such investigations, which may be instituted for the sole purpose of satisfying the Secretary's administrative curiosity, information may be gathered, reports

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[7] Section 601(a) provides as follows:

"The Secretary shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except Title I or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto. The Secretary may report to interested persons or officials concerning the facts required to be shown in any report required by this Act and concerning the reasons for failure or refusal to file such a report or any other matter which he deems to be appropriate as a result of such an investigation."

may be prepared, and union members, among others, may be advised of the Secretary's findings.[8]

The purpose of this broad delegation of investigatory and disclosure authority was explained by the Senate Committee on Labor and Public Welfare as follows:

> This provision insures that union members will have all the vital information necessary for them to take effective action in regulating affairs of their trade union, either through voluntary compliance of the labor organization with the reporting requirements of the act or as a result of investigation and reports by the Secretary of Labor.[9]

The interrelationship between the Secretary's investigatory authority under Section 601 and his remedial powers under Section 402 was considered by the Second Circuit Court of Appeals in *Wirtz* v. *Local 191, Teamsters,* 321 F. 2d 445, 448:

> No conflict is created by reading Section 402 and Section 601 together. Section 402 provides for the Secretary's instituting an action in the courts in behalf of an individual who has complained of a violation of Title IV. Section 601 provides that the Secretary shall "determine the facts relative" to a violation or threatened violation and that he

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[8] "The public disclosure functions of Section 601 have a certain similarity of purpose with the disclosure concepts of the Securities and Exchange Act; to a degree each has as its purpose ventilation of facts in which the public at large, as well as a particular segment—here union members—have a genuine interest . . . ." *International Bhd. of Teamsters* v. *Wirtz,* 346 F. 2d 827, 831 (D.C. Cir.)

[9] S. Rep. No. 187, 86th Cong., 1st Sess. 9 (1959), reprinted in NLRB Leg. Hist. 405.

> may report the results of his investigation "to interested persons or officials." It may be that some or all of the limitations of Section 402, such as the exhaustion of internal remedies, are relevant to the suit which that section authorizes; there is in Section 601 no similar limitation on the Secretary's power to investigate and report. Presumably the Secretary can bring an action only when a complaint has been filed by an individual member (Section 402). But he can investigate and report without such a complaint. The two sections of the statute can thus be read together and each be given full effect in complete harmony and without any trace of clashing purposes.

Accordingly, there can be no question that the Secretary was in a position to know whether a violation "giving rise to the Secretary's suit persisted into the second election" (Pet. Br. p.21), and that he could have reported any findings of irregularities to the members of the Local and others. Members thusly alerted to the existence of violations during the 1966 election could have resorted to the union's internal tribunal and, if there unsuccessful, to the Secretary.

The Secretary's next unwarranted assumption, relied upon to support the continuing need for a supervised election, is that "incumbent officers enjoy inherent advantages in obtaining re-election in an unsupervised election because they control the electoral machinery" (Pet. Br. p.12), and that "[e]ven if it cannot be shown in a post-election investigation that the intervening election was conducted in violation of the Act, there can be no assurance that the unlawfully elected incumbents forwent the opportunities for manipulation that an unsupervised election permits" (Pet. Br. p.25).

The baselessness of this argument is made plain by the facts of the instant case. At the Local's May 1, 1963 nomination meeting, in accordance with Article VI, Section 1, of the Uniform Local Union Constitution, three rank-and-file Judges of Election were chosen in a secret ballot election (R. 35). The chairman of the Judges then entertained nominations for office (R. 60). Cecil Dial (the incumbent Business Representative), Andrew E. Jackson, and a third candidate were nominated for Business Representative. The Judges determined that each candidate was eligible to hold office (R. 46-47). Because the June 8, 1963 election for Business Representative resulted in a tie between Dial and Jackson, the Judges conducted a runoff election on July 13, 1963. In the run-off, Jackson defeated Dial by a vote of 198 to 179 (R. 55, 92).

It thus appears that none of the Government's sinister preconceptions materialized in the instant case. The election was not conducted by incumbents, but rather, by a committee of disinterested members who had themselves been elected by a secret ballot vote of the members. In addition, it was Dial, an incumbent officer, who was defeated in the election and who ultimately sought the assistance of the Secretary,[10] and it was Jackson, a rank-and-file member, whom the Secretary sought to remove from office.

Moreover, contrary to the Secretary's supposition that his presence is necessary to "break the cycle of control" which incumbents allegedly perpetrate (Pet. Br. p.22), the fact is that a vast number of unions have provided for rank-and-file supervision of their elections. A 1965 Labor Department study of the provi-

[10] The complainant in No. 57 was also an incumbent (57 R. 27).

sions of the constitutions of national unions covered by the Act having 40,000 or more members reported as follows:

> Twenty-four of the pre-LMRDA and twenty-five of the post-LMRDA constitutions, governing nearly one-half of the membership of the organizations studied, have provisions directing subordinate local unions to conduct officer elections under the immediate supervision of a committee. In addition, a large majority of those constitutions specify the composition of the committee, the method of selecting its members, and their duties . . . .
>
> Post-LMRDA constitutions designating the composition of election committees generally require them to be composed of 3 or more good standing, impartial, rank-and-file members who are not candidates for office. The selection of members is sometimes further limited to members in attendance at the nominating meeting, at which time most election committees are formed. In addition, a few unions, including the Hod Carriers [Laborers'] and the Ladies' Garment Workers, require election committee members to have the same qualifications as officers. Thus, the former union's post-LMRDA constitution directs local elections to be conducted under the supervision of three "Judges of Election," who are elected or appointed at the nominating meeting; only members who are not candidates are eligible, but they must
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> ". . . possess all of the qualifications required of candidates for office. The Chairman at said meeting shall examine such qualifications."[11]

Even in those instances in which incumbent officers do supervise union elections there is no basis for the

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[11] U. S. Department of Labor, *Union Constitutions and the Election of Local Union Officers* (1965) pp. 61-62.

assumption that opportunities exist for election manipulation by "using techniques which are not demonstrably unlawful but nonetheless favor incumbents" (Pet. Br. p.22), or that such techniques are outside of the direct purview of Title IV, and are therefore subject to being remedied only in a "supervised" election. In addition to all of the specific provisions of Section 401 designed to equalize the positions of candidates who may be challenging incumbents,[12] Section 401(c) declares broadly that "[a]dequate safeguards to insure a fair election shall be provided. . . ." Hence, it would seem reasonable to conclude that "decisions regarding election procedure which favor the incumbent slate" (Pet. Br. p.22), which would undermine "a fair election" would be within the Secretary's power to remedy on a case-by-case basis in response to complaints from members.

Moreover, the Secretary's assertion that "unlawfully elected incumbents . . . perpetuate their office in

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[12] "To prevent union officials from gaining improper advantage, section 401 (c) requires a union to distribute any candidate's campaign literature to the members at his own expense, and to refrain from discrimination between candidates in making other facilities available. Section 401 (g) prohibits using union funds to promote the candidacy of any person. The administration of the latter provision will require delicate judgments. When a union president visits major locals on union business during the months before an election, he is not unmindful of his political fences. The international representative who goes to another city to handle grievances may be expected to discuss an impending election. The incumbents invariably command more space in the union newspaper than the opposition. Legislation can no more wipe out these advantages than it can prevent a President's dramatic move toward world peace from aiding his campaign for reelection . . . ." Cox, *Internal Affairs of Unions Under the Labor Reform Act of 1959*, 58 Mich. L. Rev. 819, 844.

subsequent elections through control of the electoral machinery . . ." (Pet. Br. p.22), is purely conjectural and can find no support in the statutory scheme or the underlying facts. Indeed, in Section 402(a), Congress declared that every election challenged by the Secretary "shall be presumed valid pending a final decision thereon", and, in the enforcement procedure established to challenge such elections, the burden is placed upon the Secretary to prove by "a preponderance of the evidence" that a "violation of section 401 may have affected the outcome of an election." However, in his zeal to invalidate the Local's unchallenged 1966 election, the Secretary relies merely on suspicion and surmise contrary to the statute's express requirement of proof.

It is thus apparent that nothing in the statute or the legislative history gives rise to the slightest inference that an election supervised by the Secretary was intended to serve any long-term therapeutic purpose. Rather, all of the relevant indices point instead to the conclusion that the supervised rerun was merely designed to ensure that a *court-ordered* election would conform to the statutory requirements and that the Secretary would report to the court that all violations found to exist had been remedied.

Finally, in light of the Secretary's successful experience in litigation brought under Section 402, it is difficult to understand his frustration over the occasional application of well-established mootness principles to such suits. Between December 13, 1959, the first date upon which the election provisions of the Act became effective, and June 30, 1965, a period during which the more than 50,000 labor organizations covered by the

Act must have conducted substantially in excess of 100,000 elections subject to the provisions of Title IV, the Secretary filed a mere seventy-five suits seeking to vindicate Title IV rights.[13] The disposition of these seventy-five suits according to Department of Labor publications,[14] as well as other departmental sources was as follows:

> (1) In fifty-seven cases the Secretary (1) obtained court orders and/or stipulations providing that a rerun election or the next reguarly scheduled union election would be conducted in compliance with the Act and, in most cases, under the supervision of the Secretary; or (2) was otherwise satisfied that the union would take or had taken steps to remedy violations;
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> (2) In ten cases the Secretary was unsuccessful in obtaining the relief sought for reasons other than mootness;

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[13] "The Department's figures as of March 9, 1965, indicate that of the 383 cases that have reached the Washington office, violations affecting the outcome were found in 183. Of that latter group, 113 cases were settled through voluntary compliance. In 52 of these cases the Department supervised the correction, while in 61 cases no supervision was thought necessary." Note, *Election Remedies Under the Labor-Management Reporting and Disclosure Act*, 78 Harv. L. Rev. 1617, 1633.

[14] Bureau of Labor-Management Reports, *Summary of Operations, 1961*, Appendix B, pp. vi-ix; Bureau of Labor-Management Reports, *Summary of Operations, 1962*, Appendix A, pp. ii-x; Bureau of Labor-Management Reports, *Summary of Operations, 1963*, pp. 16-18; U.S. Department of Labor, *Summary of Operations, 1964, Labor-Management Reporting and Disclosure Act*, pp. 19-22; U.S. Department of Labor, *Summary of Operations, 1965, Labor-Management Reporting and Disclosure Act*, pp. 26-28; U.S. Department of Labor, *Summary of Operations, 1966, Labor-Management Reporting and Disclosure Act*, pp. 31-35.

(3) In the remaining eight cases, including the instant case and No. 57, the issue of mootness presented an impediment, in whole or part, to the Secretary's obtaining relief.[15]

These statistics give rise to several observations.[16] First, it would appear that in light of the very small number of suits instituted, voluntary compliance by unions with the requirements of Title IV has been extremely high.[17] Secondly, as to those few cases which have found their way to court each year, the Secretary has been extraordinarily successful in obtaining favor-

[15] In four of these cases the Secretary was partially unsuccessful for reasons other than mootness.

[16] All of the aforementioned cases have been collected in Appendix B at pp. 5a-19a. They have been listed in chronological order by date of filing. Each case reference indicates the disposition of the suit, in accordance with the categories enumerated above. Hence, the cases listed in Category I on pp. 5a-16a are those mentioned in Para. (1) above. Those listed in Category II on pp. 16a-17a are referred to in Para. (2) above and those listed in Category III at pp. 18a-19a are those referred to in Para. (3) above.

[17] "[T]hree-fourths of the national unions included in this study have deemed it desirable or necessary to amend their constitutions since the passage of the Act, revising previously existing provisions as well as adding new provisions pertaining to aspects of local election procedures not formerly contained in the constitutions. Many organizations have actually incorporated 1 or more of the election requirements of the Act in their governing documents either verbatim or by reference.[8]

[8] The impact which this legislation had on union constitutions is somewhat greater than that indicated by the number of post-LMRDA amendments, as a number of organizations apparently adopted amendments based upon the 'legislative debate prior to the passage of the Act.'" U.S. Department of Labor, *Union Constitutions and the Election of Local Union Officers*, p. 7 (1965).

able judgments or settlements.[18] Finally, in light of the few cases which have been rendered moot, it would appear that mootness has served in no significant way to impede the effective administration of the Act by the Secretary.

In any event, to the extent that mootness does limit the Secretary in his salutary desire to vindicate the rights of union members in Title IV litigation, it is readily apparent that the problem does not arise from a misreading of the statute, but rather, from the delays which commonly beset modern judicial administration. As the Second Circuit Court of Appeals observed in *Wirtz* v. *Local Union 410, etc., Operating Engineers,* 336 F. 2d 438, 444:

> As these cases illustrate, it is the delays incident to civil cases in the district courts which create the substantial likelihood that subsequent union elections will moot Title IV cases prior to appellate review. To prevent recurrence of such delays, we think the district courts should expedite the trial of Title IV cases to the greatest extent possible.... (Footnote omitted).

Respondent agrees with the Secretary that the remedies of (1) a new suit challenging the second election; (2) an injunction against the holding of another election pending completion of the Secretary's suit; and (3) an injunction against the practice found to violate the Act, are unauthorized by the statute, and are therefore unavailable to prevent a dismissal for mootness (Pet. Br. pp.33-37).

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[18] Moreover, the number of cases settled after the institution of suit would seem to conflict with the assertion that "a commencement of litigation generally stiffens the position of the parties and makes settlement more difficult" (Pet. Br. p.32, fn.18).

However, the Secretary much too readily dismisses the alternative of expedited proceedings in suits under Title IV. Ordering the advancement of hearings and trials in these cases would by no means be unique or unprecedented. In other election cases in which expedition has been necessary to effectuate the rights of the parties, the courts have not been hesitant to accelerate their proceedings to meet the exigencies of the situation. In *Ray* v. *Blair,* 343 U.S. 154, *opinion reported,* 343 U.S. 214, for example, the plaintiff sought a writ of mandamus in an Alabama circuit court on January 29, 1952, seeking a place on the ballot as a presidential and vice-presidential elector in the state primary to be conducted on May 6, 1952. A writ of mandamus issued, and the Alabama Supreme Court thereafter affirmed. This Court granted certiorari on March 24, 1952, heard argument on March 31, 1952, and rendered its decision and judgment on April 3, 1952, in advance of the filing of its full opinion on April 15, 1952. See *Gerende* v. *Board of Supervisors,* 341 U.S. 56. Surely, upon prompting from this Court the district courts would provide expedited treatment for Title IV cases.[19] Such treatment would not place an undue burden upon the courts or other litigants in light of the small number of cases arising under Title IV. And, more significantly, such a solution would serve to vindicate more fully the congressional purpose of resolving election disputes promptly without in any

[19] The Secretary could also make a contribution to this effort by availing himself of opportunities to quicken the pace of litigation. In the instant case he might have sought an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from the July 14, 1964 decision of the district court dismissing part of his complaint. Instead, the Secretary waited almost two years to appeal from this judgment.

way sanctioning the Secretary to exceed his limited congressional mandate.

B. The Case Is in Any Event Mooted by Amendments to the Uniform Local Union Constitution Enacted at the October 1966 Convention of the International

Even if it were to be assumed *arguendo,* that notwithstanding the conduct of intervening elections, Congress intended to authorize the Secretary to oversee union elections as a remedy for alleged lingering violations, in the instant case the need for such continued surveillance has been entirely dissipated and the case has been rendered moot by supervening events not previously considered below.

The gist of the violation claimed by the Secretary to have occurred in the Local's 1963 general election and runoff was that fifty to sixty ineligible members were permitted to vote and sixteen ineligible members were permitted to be candidates (R. 75-76). The Secretary predicated his position upon Article VIII, Section 5 of the Uniform Local Union Constitution, which then provided: "The monthly dues are due on the first day of the month and unless paid on or before the last day of the following month, the member shall be considered to be in arrears and suspended without notice" (R. 37).

The Secretary construed this provision as requiring the Local to treat a member who had not made timely payment of dues as having been *automatically suspended without notice.* According to the Secretary, upon automatic suspension a member lost all rights of membership except the right to be restored to good standing by the payment of a readmission fee in accordance with Sections 7 and 8 of Article VIII (R. 37).

Hence, in the Secretary's view, members who had at any time fallen into bad standing were not entitled to vote or be candidates[20] in the Local's elections at least until a readmission fee had been paid (R. 95-96).[21]

The Secretary also found that "[t]he above violations resulted from the Local's payment of per capita tax to the International for certain persons, although the Local had not received dues payments from them" (R. 69). This practice itself had become a matter of concern to the International. Hence, on February 7, 1963, four months in advance of the Local's June, 1963 election, the General President and General Secretary-Treasurer, on behalf of the International's General Executive Board, wrote to all affiliated local unions, district councils, and members as follows:

> At the outset, it is to be observed that corresponding payments made by Local Unions to the General Secretary-Treasurer of the International Union, such as per capita tax, etc., are received and accepted on the presumption of propriety; namely, that the payments submitted are pursuant to and

[20] In addition, to be a candidate such a member was required to be "in continuous good standing in the International Union for a period of two years and in continuous good standing in the Local Union for a period of one year" (R. 34).

[21] In connection with the overall statutory purpose of encouraging membership participation in union affairs, it is of significance to note that the Secretary took the position that Jackson, the winner of the runoff, having paid his dues on Monday, July 1, 1963, was one day late in making timely payment and was, therefore, not in "good standing" and ineligible to run. *But cf., Wirtz* v. *Peninsula Ship Builders Ass'n.*, — F. 2d —, 66 LRRM 2156, in which the Fourth Circuit agreed with the Secretary that a suit brought under Title IV was timely filed within the 60-day period prescribed by Section 402(b) of the Act even though the action was filed on a Monday, the sixty-first day, since the sixtieth day fell on a Sunday.

> in accordance with the full intent of constitutional requirements. . . . It now appears that in some instances, Secretaries-Treasurers of Local Unions forward per capita tax to the International Union for certain members who have not paid dues for the corresponding month.
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> * * * * * * *
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> In order that this entire area of mistaken and improper activity may be corrected, the General Executive Board . . . voted, that in all instances where and when the General Secretary-Treasurer, on and after April 1, 1963, finds that per capita tax and other fees submitted by Local Unions, are not based upon corresponding payments directly made by the member to the Local Union, such submission shall be deemed to be invalid, improper, and of no effect.
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> It must be noted, as stated above, that where and when such finding occurs, the result is, that the members affected are not in good standing if the delinquency is for a period longer than that specified and provided for in the Constitution (R. 39-40).[22]

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[22] Notwithstanding this admonition, the district court found that "the Secretary-Treasurer of the [Local] failed to comply with International Union's directive of February 7, 1963. In fact, he acted directly contrary to the instructions contained therein" (R. 99).

The Secretary-Treasurer of the Local, in an affidavit filed by the Secretary in support of his motion for summary judgment, explained his dereliction as follows:

> I as Secretary-Treasurer of Local 125 have, on my own initiative, paid per capita tax to the International for members who have not paid dues to the Local. Many of these persons should have been automatically suspended. I am also aware that these persons, delinquent over 61 days, should have been required to pay reinstatement fees to Local 125. According to our Constitution, these members who I have carried by paying their per capita tax who have not paid a reinstatement fee . . . are . . .

In addition to its desire to eliminate the practice of a Local's paying per capita tax for members who had not paid their corresponding dues, the General Executive Board of the International was also concerned over the serious implications of the Secretary's position, that under a literal reading of Article VIII, Section 5 of the Uniform Local Union Constitution, members would be deprived of their right to vote in a local union election if at any time during their membership they had been delinquent in dues for more than two months and had been automatically "suspended without notice," and had never paid a readmission fee thereafter. Hence, even though a member might have made up his arrearages in dues to the Local, according to the Secretary such a member could not restore himself to good standing unless he paid a readmission fee.

Accordingly, on January 17, 1966, the General President and General Secretary-Treasurer addressed a letter to all affiliated local unions, district councils and members, advising that the constitution was being misinterpreted to deprive members of their franchise notwithstanding that "[t]he Board had always interpreted its Constitution liberally to preserve the right of members to vote" (R. 89). The letter expressed concern that the Secretary's restrictive interpretation

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not members in good standing and they should not have been permitted to vote in Local 125's election. The reason I carried some of these members by paying per capita tax to the International was so that they would work. Unemployment has been high in Youngstown, Ohio and members don't have the money for dues. I paid their per capita out of the General Funds of the Local. However, many persons have been suspended by me for failure to pay dues. I only paid per capita for members I knew had been unemployed, had been long time . . . members and I took into consideration personnel [sic] hardships and family situations (R. 62).

"would result in depriving many tens of thousands of . . . members and their families of death benefits built up over the years and of pension rights under collectively bargained pension plans throughout this country." [23] The letter advised that the General Ex-

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[23] The Secretary's restrictive and unduly technical interpretation of the Uniform Local Union Constitution ignored the practical problems which the International Union attempted to meet in dealing with the host of problems faced by construction laborers. Because the vast majority of its members are confronted with the sporadic nature of construction employment, the International sought to preserve union membership and protect the members' right to vote from being affected by the economic hardships of unemployment. Indeed, in other areas subject to *his* concern, the Secretary has acknowledged and sought solutions to the problems of construction workers created by seasonality and unemployment:

> For construction workers, seasonality means serious unemployment and loss of earnings. Peak operations in the summer and fall draw many thousands of workers into the labor force who cannot find employment in the industry during the slack of winter. This has resulted in high unemployment in the winter, thus making the industry's unemployment rate in recent years more than double that for the Nation.
>
> * * * * * *
>
> The rate of unemployment in the construction industry is normally higher than in any other major industry division. Unemployed construction workers have regularly accounted for about 10 to 12 percent of all the unemployed, on an annual average basis. During the post-World War II period, among wage and salary earners, the annual rate for construction workers in private industry has been more than twice as high as for wage and salary workers in the total economy.
>
> * * * * * *
>
> . . . In terms of annual averages, unemployment rates for *construction laborers* run about twice as high as those for construction craftsmen. (Emphasis supplied). Myers and Swerdloff, *Seasonality and Construction,* 90 Monthly Labor Review 1-3 (September, 1967).

ecutive Board had adopted a resolution providing as follows:

> [The Union's] Constitutional provisions shall not be interpreted to deprive members of their legal and constitutional right to vote in those instances where local unions have accepted dues late and remitted per capita tax within the constitutional period to this International Union, so that the local unions were never notified by the International Union that such members were suspended . . . . (R. 90-91).

Notwithstanding this effort by the International to clarify the provisions in question, the district court in its April 1, 1966 decision (R. 92-109), adopted the Secretary's interpretation that "once a member has fallen in arrears and has thereby lost his rights, he may only regain the same by paying the established readmission fee" (R. 101).

On October 17-21, 1966, which was subsequent to the Local's 1966 general election, the International conducted its fifteenth constitutional convention. At the convention, the Committee on Constitution and Law proposed, *inter alia,* that Article VIII, Section 5 of the Uniform Local Union Constitution be amended to provide as follows:

> The monthly dues are due on the first day of the month and unless paid on or before the last day of the following month the member shall be *subject to be suspended by the International Union without notice.*

The report of the convention proceedings discloses that the foregoing amendment, designated Proposal 48, along with other proposed amendments, were intro-

duced in an effort to eliminate comprehensively the hardship created by the Secretary's restrictive interpretation of the Constitution:[24]

> SECRETARY O'SULLIVAN: Proposals 30, 35, 45, 48 and 50 are designed to clarify the present provisions of the Constitution and to conform the Constitution to the practice of the International Union.
>
> In the recent past, some of our affiliates which had conducted regular elections, found these elections being attacked by the Department of Labor which literally applied certain provisions of the Constitution, without giving due regard to the actual system under which the Union functions.
>
> Under these interpretations, the standing of a member in the Local Union was inquired into and if, at any time, a member had paid his dues beyond the constitutional period, it was the view of the government in certain cases that such member was not eligible to serve as a candidate for office or vote in the Union's election.
>
> This, however, was not the intent of the framers of the Constitution when the language of the Constitution was drafted. In truth, and in fact, the practice had always been that secretary-treasurers would report to the International Union the list of members to be suspended and the General Secretary-Treasurer of the International Union would notify the secretary-treasurer of a Local Union that these members had been suspended.

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[24] The texts of all the proposed amendments to the Uniform Local Union Constitution, as adopted by the Convention, clarifying the Union's rules regarding "good standing" insofar as Union elections are concerned, are set out in Appendix D at pp. 24a-26a.

The proposed change to the Constitution would apply in the area of elections. So long as a member had not been, in fact, suspended and was currently paid in his dues, then such member, under the General Executive Board's proposal, would be eligible to vote in the Union's election and inquiry into past dilatory payments would be fore-closed in the election area.

Your Committee is of the opinion that the foregoing change would conform the Constitution to the long standing practice of the International Union and should diminish, if not eliminate entirely, unnecessary, tedious, technical investigations and litigation.

Accordingly, therefore, your Committee recommends concurrence in Proposals 30, 35, 45, 48 and 50.

I move for adoption of this portion of the Committee's report, Mr. Chairman.

CHAIRMAN FANCHER: I second the motion.

PRESIDENT MORESCHI: It has been regularly moved and seconded that the convention approve this portion of the Committee's report.

Any remarks?

(No response.)

All in favor of the motion, signify by saying aye.

(Chorus of ayes.)

Contrary, if any?

(No response.)

I declare the motion carried unanimously, and so ordered.[25]

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[25] *Report of Proceedings, 15th Convention, Laborers' International Union of North America,* pp. 237-38.

Upon the adoption of the foregoing constitutional amendments, the Secretary's restrictive interpretation of the 1961 Uniform Local Union Constitution has been entirely nullified for all local unions. Hence, in any future election in Local 125 members claimed by the Secretary as having been improperly qualified to vote and be candidates would be allowed to vote and run for office if they had not, *in fact,* been suspended by the International and were current in the payment of their dues on election day.[26] Accordingly, the 1966 constitutional amendments, in any event, rendered this case moot.

II. THE DISTRICT COURT CORRECTLY HELD THAT THE SECRETARY EXCEEDED HIS STATUTORY AUTHORITY BY ALLEGING IN HIS COMPLAINT THE EXISTENCE OF VIOLATIONS AS TO WHICH THERE HAS BEEN NO EXHAUSTION OF REMEDIES BY THE COMPLAINANT

Insofar as it is relevant to the second question presented, Section 402 of the LMRDA provides as follows:

> (a) A member of a labor organization—
>
> (1) who has exhausted the remedies available under the constitution and bylaws of such organization and of any parent body,
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> * * * * * * *
>
> may file a complaint with the Secretary within one calendar month thereafter alleging the vio-

[26] Article VI, Section 3(d) of the Uniform Local Union Constitution now reads in part:

> "The Secretary-Treasurer, together with a Judge of Election, shall then determine whether such person is current in the payment of his dues and otherwise qualified and entitled to vote." See Proposal No. 45, Appendix D, p. 25a.

> lation of any provision of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the election . . . of officers). . . . .
>
> (b) The Secretary shall investigate such complaint and, if he finds probable cause to believe that a violation of this title has occurred and has not been remedied, he shall . . . bring a civil action against the labor organization . . . to set aside the invalid election . . . .

"It thus appears from the language of the statute itself that the Secretary may proceed to vindicate only those violations with respect to which he has received complaints." *Wirtz* v. *Hotel, Motel and Club Employees, Local 6*, — F. 2d —, 65 LRRM 3032, 3035 (2nd Cir.); *Local 545, etc., Operating Engineers* v. *Wirtz*, — F. 2d —, 65 LRRM 3041 (2nd Cir.). This conclusion is evident from the language of Section 402(b), which provides that "the Secretary shall investigate *such complaint*. . . ." Thus, the remedial authority of the Secretary under Section 402 is confined to matters raised in the complaint which he has received from a member. Accordingly, the instant case may easily be disposed of on the ground that in his complaint Dial asked "the Department of Labor to investigate an election held at Local 125 July 13, 1963" (R. 59), and that the Secretary thus had no authority to go beyond Dial's complaint in seeking to set aside the June 8, 1963 general election.[27]

Dial's protest to the International similarly was confined to challenging the runoff. But the Secretary

[27] Since the runoff election for Business Representative was the only contest conducted on July 13, 1963, it is clear that Dial intended to confine his complaint solely to that contest.

maintains that he is neither limited in his remedial authority by the scope of the complaint which he has received nor by the substantive extent to which the complainant has invoked the remedies available under his union's constitution. Hence, even if the Secretary is not limited to the scope of the member's complaint filed with him, the question remains whether the Secretary may seek to remedy violations which have not been raised by the complainant within his union.

This issue is also amenable to disposition purely on the basis of the statutory language since it is clear that a complaining member is required to "exhaust the remedies available" under the constitution of his union before he may proceed to file his complaint with the Secretary. In this context, exhaustion must connote a thorough and complete utilization of available remedies, which would require that all relevant issues be raised before the union tribunal in order to afford it an opportunity to remedy violations before they are brought to the attention of the Secretary.[28]

Such an understanding of the exhaustion principle is familiar to the courts in the area of reviewing decisions of administrative agencies. As this Court stated in *United States* v. *L. A. Tucker Truck Lines*, 344 U.S. 33, 37:

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[28] ". . . Thus, the Act itself clearly indicates a limitation on the part of the Secretary and the court to consider only matters in which a member has exhausted his internal remedies. This is in line with the legislative purpose to sustain the stability of the union organization by giving it the first opportunity to correct a grievance of an individual member." *Wirtz* v. *Local 9, etc., Operating Engineers*, 366 F. 2d 911, 914 (10th Cir.), *vacated*, 387 U.S. 96.

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.

Aside from the statutory language which, on its face, comports with the well-established meaning of exhaustion of remedies, the legislative history, which has been thoroughly reviewed in the brief of *amicus curiae,* incorporated by reference herein, indicates the clearest congressional intention to provide union members with an opportunity for redress of election complaints through the Secretary, only after their union's internal machinery has had an opportunity to consider the protest and determine that relief is not warranted.[29]

For example, the objective of preserving union autonomy to the fullest extent possible is reflected in the report of the Senate Committee on Labor and Public Welfare on S. 1555, the Senate version of the bill as enacted:

> 1. The committee recognized the desirability of minimum interference by Government in the in-

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[29] Professor Archibald Cox, a principal congressional aide in the drafting of the legislation, has commented:

> ". . . Any member who can show that he has pursued in timely fashion the remedies available to him, within the union and any parent body, should be allowed to file a complaint with the Secretary of Labor alleging that a union election violated the statute. Requiring the exhaustion of internal remedies would preserve a maximum amount of independence and self-government by giving every international union the opportunity to correct improper local elections . . . ." Cox, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 609, 633.

> ternal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken unions in their role as collective-bargaining agents.
>
> 2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.[30]

If these principles are to be manifested in the administration of the Act, the statute must not be implemented in a manner which ultimately is certain to make a sham of a union's internal judicial processes. Hence, to preserve confidence in a union's organic laws and tribunals in the regulation of union elections, it is crucial that a member be obligated to avail himself fully of his internal remedies to provide his union with an opportunity to redress his election complaints prior to their coming to the Secretary's attention. A rule which would permit a member to file a limited protest under his union's internal procedures as a mere formality prior to filing a broad-scale complaint with the Secretary would destroy completely

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[30] S. Rep. No. 187, 86th Cong., 1st Sess. 7 (1959), reprinted in NLRB Leg. Hist. 397.

those internal processes of union self-government and regulation which Congress sought to promote and encourage by requiring the prior exhaustion of internal remedies.[31]

Indeed, the Secretary's view as to the scope of the exhaustion of remedies requirement would, if adopted, effectively read out of the statute any exhaustion requirement and render the union's hearings procedures a mere exercise in futility. The International has, for many years, provided full and fair hearings pro-

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[31] The strength and vitality of these processes within the Laborers' International Union is reflected in the following excerpt from the Report of the International's General Executive Board to the Union's October, 1966 Convention:

> In the five years since our last convention, of the 813 cases presented to the General Executive Board for consideration, 359 cases involved protests of nomination and/or election procedures. These are the types of cases which are potentially subject to complaint to the Department of Labor under the election provisions of the Landrum-Griffin Act. These 359 cases break down as follows:
>
> 19—appeals were withdrawn
> 95—appeals sustained
> 245—appeals denied
>
> With respect to the 114 cases which were either withdrawn or sustained, the files were closed and no further complaints were taken to the Department of Labor. The significant figure, however, is that of the 245 cases in which appeals were denied and which were therefore subject to further complaint to the Department of Labor, only 7 cases resulted in litigation following investigation by the Department of Labor, and of these 7 cases the Courts fully approved the decisions reached by the General Executive Board in all but 3 cases. In no case did a court order a special election. We cannot help but express some little pride in our processes and the feeling that our time and effort was well expended.

The complete text of the General Executive Board's report on appeals is set out in Appendix C, at pp. 20a-23a, *infra*.

cedures[32] consistent with the congressional standards set forth in Section 101(a)(5) of the Act, 29 U.S.C. 411(a)(5).[33] Thus, upon receipt of an election protest, the International notifies all affected parties and schedules a hearing at which oral and documentary evidence may be introduced enabling its hearings panel to render judgment upon a reviewable record. Such hearings are held quarterly in order to accommodate the union's decisional processes with the time limitation embodied in Section 402(a)(2) of the Act. The time and effort expended by the International in arriving at a substantive judgment on the record is totally wasted if the Secretary's authority to file a Title IV suit is in no way limited by the issues raised in the union's proceeding.

This Court recognized in *Calhoon* v. *Harvey,* 379 U.S. 134, that Congress intended the Secretary to play a role under Title IV which complements a union's internal processes:

> . . . Section 402 of Title IV, as has been pointed out, sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secre-

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[32] See, Taft, *The Structure and Government of Labor Unions* (1954), pp. 157-161, for an evaluation of the International's procedures for handling appeals in disciplinary and election cases.

[33] Section 101(a)(5) provides as follows:

> No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

> tary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest .... In so doing Congress, ... decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. *Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies,* and, where that fails, to utilize the agencies of Government most familiar with union problems *to aid in bringing about a settlement* through discussion before resort to the courts. (Emphasis added) (Footnote omitted) (*Id.* at 140).

Congress thus intended the Secretary, in the administration of Title IV, to "aid in bringing about a settlement" of a union's "own internal controversies" when they had not been resolved within the union. But, with respect to matters not raised before a union's own tribunals, no "internal controversy" exists and, in such circumstances remedial intervention by the Secretary is both unwarranted and unauthorized.[34]

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[34] The Secretary seeks to justify the broad sweep of his asserted authority by comparison to the role of the General Counsel under the National Labor Relations Act (Pet. Br. p. 47, fn. 27). It is clear, however, that such comparison fails on at least two grounds. First, there is no statutory exhaustion of remedies requirement under the National Labor Relations Act, as a prerequisite to the filing of a charge, which limits the scope of the General Counsel's authority to proceed. Secondly, whereas Title IV limits the filing of complaints to union members who have first exhausted available remedies, the National Labor Relations Act provides that "any person" may file a charge, regardless of whether he is aggrieved or in any way involved in the dispute.

To be sure, under Section 601 the absence of a Title IV complaint in no way limits the Secretary in his ability to investigate and make disclosure concerning the conduct of union elections. Respondent has already discussed at pp. 24-26, *supra,* the interrelationship between the Secretary's remedial authority under Section 402 and his investigatory power under Section 601. See *Wirtz* v. *Local 191, Teamsters,* 321 F. 2d 445 (2d Cir.); *Wirtz* v. *Local 57, Operating Engineers,* 346 F. 2d 552 (1st Cir.). Under Section 601, the Secretary can investigate each and every phase of a union's election and, in fact, if he deemed it necessary he could decide to station himself as an observer at all union elections. However, as to election violations uncovered in the course of such unsolicited investigations, while the Secretary may not institute Title IV proceedings he may report his findings to interested persons and officials, including members of the union, for whatever action they may deem appropriate. *Cf. International Bhd. of Teamsters* v. *Wirtz,* 346 F. 2d 827 (D.C. Cir.). Members who have been thusly alerted to election misconduct may then seek to invoke the union's own appellate procedures and, if unsuccessful, they may resort to the Secretary. Nor are they otherwise without recourse.[35] They may also seek to remove officers guilty of wrongdoing in connection with elections, either

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[35] "Provided with information obtained through such an investigation, responsible members of a labor organization can attempt to prevent recurrences of any violations discovered, can amend the organization's constitution if necessary, and can have the knowledge necessary to take effective action in regulating the affairs of their union. In addition, other labor organizations may profit from particular disclosures with respect to common problems." (Brief for the Secretary, p. 11, *Wirtz* v. *Local 191, Teamsters,* 321 F. 2d 445 (2nd Cir.).

under the provisions of their union's own constitution, or, if these are inadequate, under Section 401(h) of the Act.[36]

In light of the foregoing it is understandable that the Court of Appeals for the Second Circuit recently reached precisely the same conclusion as was arrived at by Judge Connell in the case at bar (R. 5). In *Wirtz* v. *Hotel, Motel and Club Employees' Union, Local 6*, — F. 2d —, 65 LRRM 3032, 3035-36, it declared:

> . . . The legislative history reveals that Congress intended that the Secretary should have the power to bring an action only after a complaining member has exhausted his union remedies. See, for example, remarks of Senator Kennedy, June 12, 1958, [Dep't. Lab.] Legislative History, supra, at 1093; S.Rep. No. 1684, 85th Cong., 2nd Sess. (1958), reprinted in [Dep't. Lab.] Legislative History, supra, at 701.
>
> The Secretary argues strongly for a general power to protect the public interest, but nothing

[36] Section 401(h) provides:

> If the Secretary, upon application of any member of a local labor organization, finds after hearing in accordance with the Administrative Procedure Act that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title.

It is by no means insignificant that the provisions of Section 401(h) are geared to come into play only when a union's own internal procedures are found to be inadequate.

> in the statute or in its legislative background suggests the existence of any such general power. The Secretary's function is, in Senator Kennedy's words, to act as "the (complaining) union member's lawyer." See [Dep't. Lab.] Legislative History, supra, at 1093.

Local 545, etc., Operating Engineers v. *Wirtz*, — F. 2d —, 65 LRRM 3041 (2nd Cir.); *Wirtz* v. *Local 9, etc., Operating Engineers*, 366 F. 2d 911 (10th Cir.), *vacated*, 387 U.S. 96.

It is thus clear that Congress, in the enactment of Title IV, established minimum safeguards to ensure that union elections would be fairly and honestly conducted. It decided to vindicate the public interest through a narrowly-drawn remedial scheme which placed the means for redress in the hands of union members themselves. By so doing, Congress manifested its desire to promote union democracy and preserve unions as free and independent institutions, capable of regulating their own affairs. The Secretary, however, prefers to ignore the clear congressional intent in favor of an unlimited governmental authority to regulate and supervise union elections. It is therefore incumbent upon the Court to reject the distorted view advanced by the Secretary in favor of preserving the carefully-balanced scheme which Congress intended.

CONCLUSION

It is respectfully submitted that, for the reasons set forth above, the decision of the court of appeals should be affirmed. However, in the event that this Court should hold that the action is not moot, respondent is of the opinion that the Court should take this opportunity to decide the question relating to the scope

of the Secretary's authority in Title IV litigation. The Sixth Circuit did not reach this issue. However, the Government's intransigence suggests that only a decision of this Court will ultimately determine the proper interpretation of Sections 402(a) and 402(b) of the Act. Moreover, this point has received sufficient consideration by the lower courts to be considered ripe for adjudication here. Hence, in the event that this issue is reached, it is the opinion of respondent that the Court should affirm the decision of the district court partially dismissing the Secretary's complaint.

Respectfully submitted,

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APPENDIX